NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 11 | Issue 1 Article 4

Fall 1993

THE LATEST BATTLEGROUND-ABORTION GROUPS MEET AT THE CLINIC

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NOTES

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All the counseling, all the talking, all the writing your Congressman, all of that has been done, and so for that child or those children scheduled to die that day, in that particular facility, nothing remains but to place your body between the victim and the killer. And so the blocking of the doors is just a logical step.

-Jayne Bray, anti-abortion activist*

Statistics show that about eighty percent of the counties in America do not have abortion available for the women who reside in those counties. Now, if you've travelled all day or overnight, or if you've spent all your money to come to Washington, D.C., where abortion is safe and legal and available and you get there and there are hundreds of screaming people outside the clinic you have an appointment with, all of a sudden your right just doesn't seem to exist anymore.

-Gina Shaw, pro-choice activist**

I. Introduction

In 1971, the Supreme Court's decision in *Roe v. Wade* recognized a woman's constitutional right to have an abortion.[1] Nonetheless, over the past twenty-two years a battle over this constitutional protection of abortion has been waged by anti-abortion and pro-choice groups, as each argues its position before courts and legislatures across the country. By 1992, in a series of cases

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* MacNeil/Lehrer NewsHour (PBS television broadcast, transcript 4183, Oct. 16, 1991).

** *Id.*

[1] 410 U.S. 113 (1973). The Supreme Court held that a woman has the right, in consultation with her physician, to have an abortion during the first trimester of pregnancy. Once the fetus is viable, however, the State, in promoting its interest in human life, may "regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother." *Id.* at 164-165.

culminating in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] the extent of that right had been greatly limited and still hangs in the balance.

Over the past few years, the battle over this issue has shifted from the courts and legislatures to the abortion clinics. Various anti-abortion groups have attacked not only the sites where abortions are performed, but also those who perform these services and those trying to utilize them. Because of the anti-abortion groups' tactics, the issue has changed. Today, regardless of the extent to which the constitutional right to an abortion exists, the practical issue is whether or not a woman can actually exercise that right.

On October 6, 1992, the Supreme Court heard arguments for the second time in *Bray v. Alexandria Women's Health Clinic*.[3] The Majority held that the Ku Klux Klan Act[4] does not authorize federal judges to bar anti-abortion groups from prohibiting access to abortion clinics.[5] As a result, the five-to-four decision written by Justice Scalia removes a powerful weapon from the hands of pro-choice groups—the ability to obtain damages, attorneys' fees, and injunctions prohibiting anti-abortion groups' protests.

This Note will discuss the nature of the controversy between anti-abortion groups and clinics providing abortions and other women's health services. It will examine the nature of a claim under 42 U.S.C. § 1985(3), the Supreme Court cases interpreting the nature of a claim under § 1985(3), and its use in the federal courts by pro-choice groups and clinics against anti-abortion demonstrators. Finally, it will examine the arguments presented and the Supreme

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[2] 112 S. Ct. 2791 (1992). The Supreme Court reaffirmed Roe's essential holding recognizing a woman's right to choose an abortion before fetal viability, while upholding limitations imposed by a Pennsylvania abortion statute, including parental consent, a 24 hour waiting period, and reporting and recordkeeping requirements. *Id.* at 2821, 2823, 2831-33.

[3] Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). The Supreme Court heard arguments early in October 1991, but later in the term restored it to the calendar for reargument, 112 S. Ct. 2935 (1992). It was speculated that a four to four tie among the justices resulted in the rescheduling so that newly appointed Justice Thomas could vote. *Arguments Before the Court—Health Care—Abortion; Ban on Obstructing Access to Clinics; 42 U.S.C. 1985(3)*, 61 U.S.L.W. 3295, 3295 (Oct. 20, 1992) [hereinafter *Arguments*].

[4] 42 U.S.C. § 1985(3) (1988).

[5] *Bray*, 113 S. Ct. at 753.

Court's decision in its first case on this issue, *Bray v. Alexandria Women's Health Clinic*,[6] concluding with an examination of proposed legislation, the ramifications of this decision, and other factors affecting a woman's ability to enter a facility offering abortion services.

A. 42 U.S.C. § 1985(3)

Section 1985(3)[7] was passed in response to widespread politically motivated violence in the South after the Civil War. State authorities were either unable, or unwilling, to prevent this violence.[8] Defeated Southerners sought to drive out Republicans, Northerners, and newly freed blacks, with the Ku Klux Klan playing a key role in these efforts.[9] The statute was intended to deter the murder and persecution of newly emancipated blacks, among others, and subsequently is called the Ku Klux Klan Act.[10]

In order to bring a suit under § 1985(3), a plaintiff must demonstrate a conspiracy "for the purpose of depriving, either directly or indirectly any person or class of persons of the equal

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[6] 113 S. Ct. 753 (1993).

[7] 42 U.S.C. § 1985(3) (1988) provides in part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[8] Steven F. Shatz, *A License to Hunt*, THE RECORDER, Mar. 29, 1993, at 10.

[9] *Id.*

[10] Shatz, *supra* note 8; *cf.* CONG. GLOBE, 42d Cong., 1st Sess. 158, 159 (1871) (describing the action of the Ku Klux Klan members intimidating blacks).

protection of the laws, or of equal privileges and immunities under the laws."[11] The relevant actions must result in an injury "in his person or property, or deprive[s] [him] of having and exercising any right or privilege of a citizen."[12] The statute awards "damages occasioned by such injury or deprivation, against any one or more of the conspirators."[13]

As originally introduced in the House, the bill provoked strong concerns that it might become a general federal tort law.[14] In response, a narrowing amendment was adopted which limited the bill's breadth so it did not create a federal remedy for all tortious, conspiratorial interferences with the rights of others.[15] The House sponsor of the original bill, Representative Shellabarger, said:

> The object of the amendment is to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.[16]

Two main cases have interpreted § 1985(3). In the first, *Griffin v. Breckenridge*,[17] the Court outlined the elements of a §

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[11] 42 U.S.C. § 1985(3) (1988).

[12] *Id.*

[13] *Id.*

[14] *See* CONG. GLOBE, *supra* note 10, at 477-79.

[15] *Id.* at 477-78, 567.

[16] *Id.* at 478.

[17] 403 U.S. 88 (1971). The petitioners were blacks from Mississippi who filed a damages claim under § 1985(3) against a group of whites from Mississippi. The whites, believing one of the blacks to be a civil rights worker, stopped their car on the highway, forced them out of it, and clubbed them. *Id.* at 89-90. The court of appeals dismissed the case for failure to state a cause of action. Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969). In dismissing the case, the court of appeals relied on Collins v. Hardyman, 341 U.S. 651, 661 (1951), which held that § 1985(3) was applicable only to conspiracies under color of state law. In *Griffin*, however, the Supreme Court held that § 1985(3) could be extended to private conspiracies, thus overturning *Collins*. *Griffin*, 403 U.S. at 101. Furthermore, the Court, recognizing the plaintiff's constitutionally protected

1985(3) claim. First, a court must determine if the defendants conspired, directly or indirectly, to deprive a person or class of persons of their constitutional rights.[18] One issue in this case was whether § 1985(3) could address an action against private persons or whether some sort of state action was required, as in a Fourteenth Amendment case.[19] The *Griffin* Court found nothing in the language of the statute requiring state action.[20] Further, upon examining the legislative history of the statute, the Court was satisfied that inclusion of purely private actions reflected congressional intent.[21] The next issue was the motivation necessary in such a private action.[22] In order to avoid turning the statute into a general federal tort law, the *Griffin* Court required "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[23]

An additional issue in *Griffin* was whether denial of the right to interstate travel constituted deprivation of a citizen's constitutional right and was therefore a deprivation actionable under § 1985(3).[24] The Supreme Court found a firmly established constitutional right to interstate travel with which neither the government nor private individuals could interfere.[25] Thus, since the right to interstate travel is a part of citizenship, its deprivation would satisfy the requirements of § 1985(3).[26]

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right of interstate travel, remanded the case to ascertain whether the parties in this case were in fact exercising that right. *Id.* at 105-07.

[18] *Id.* at 102-103.

[19] *Id.* at 96-97.

[20] *Id.*

[21] *Griffin*, 403 U.S. at 100.

[22] "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101.

[23] *Id.* at 102. In a footnote, the Court noted that it did not need to decide whether a motivation other than race would be sufficient given the facts of this case. *Id.* at 102 n.9.

[24] *Id.* at 102.

[25] *Griffin*, 403 U.S. at 105-06 (citing Shapiro v. Thompson, 394 U.S. 618, 629-631 (1969)).

[26] *Id.*

In *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*,[27] the Supreme Court continued its examination of the issue raised in *Griffin*—namely, whether only racially discriminatory motivation was sufficient for a § 1985(3) claim. The Court found that a "private conspiratorial discrimination"[28] is not the type of conduct proscribed by § 1985(3).[29] However, the Court did not fully define the requirements for "animus," merely holding that "[w]e thus cannot construe 1985(3) to reach conspiracies motivated by economic or commercial animus."[30]

B. The Controversy

Since the Supreme Court's decision in *Roe*, the conflict between pro-choice and anti-abortion groups has become emotionally charged and controversial. One of the best-known and most active of the anti-abortion groups, Operation Rescue, has staged protests at abortion clinics throughout the country.[31] A federal district court described the "rescue" tactic used by Operation Rescue as "a demonstration at the site of a clinic where abortions are performed" during which "rescuers" intentionally trespass to blockade the clinic's

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[27] 463 U.S. 825 (1983). This case involved a § 1985(3) action against a group of union members from neighboring towns brought by a construction company. *Carpenters*, 463 U.S. at 827-29. Cross, a construction company, had hired non-union workers to build a pumping station and drainage structure. Local unionized construction workers, acting under plans made at earlier meetings, assaulted the Cross employees and damaged the site itself. *Id.* The district court found in favor of the plaintiffs, Scott v. Moore, 461 F. Supp. 224, 231 (E.D. Tex. 1978), and the court of appeals affirmed that the *Griffin* test had been satisfied. Scott v. Moore, 680 F.2d 979, 988 (5th Cir. 1982).

[28] *Carpenters*, 463 U.S. at 835.

[29] *Id.*

[30] *Id.* at 838. Dissenting Justices Blackmun, Marshall, Brennan and O'Connor felt that an economic animus was enough. They found the statute sufficiently broad to include a vast number of class-based denials of equal protection, stating that civil rights statutes such as § 1985(3) "are to be given a sweep as broad as [their] language." *Id.* at 854.

[31] *See* Rita Ciolli, *Abortion Foes Close National HQ*, NEWSDAY, Feb. 1, 1990, at 15. In 1990, Operation Rescue had at least 125 locally based organizations nationwide. *Id.*

entrances and exits.[32] These aggressive tactics used by some anti-abortion groups have resulted in violence towards patients and doctors and damage to clinics. Protestors have been able to cause the closing of clinic doors for a few hours or cause substantial and costly damage. For example, in October 1989, anti-abortion protestors spilled twenty-five gallons of tar in a downtown Pittsburgh abortion clinic, causing $25,000 of damage.[33] In April 1989, demonstrators gathered across the country to block access to abortion clinics in New York, Atlanta, New Orleans, San Antonio, Detroit, Denver and Seattle.[34] Being the target of a protest can be a frightening experience. Gina Shaw was present at a "rescue" and comments:

> The doctor was trapped outside the clinic. There was one patient inside and several . . . in their cars, in vans trying to get inside, and I remember a very tall, dark haired woman coming over the top of myself and the woman next to me, trying to push us under the wheels of a van. It was terrifying. It was literally one of the most frightening experiences I'd ever gone through and I was there voluntarily to try to stop this. I wasn't a patient and I was scared![35]

As one news reporter said, "[i]n the late 1980's, anti-abortion activists created a controversial tactic aimed at disrupting abortions directly, using massive human blockades at abortion clinics."[36] Thus, anti-abortion forces have a significant impact on the ability of the clinics to provide both abortion and women's reproductive services.

Section 1985(3) has provided a better remedy for pro-life

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[32] National Organization for Women v. Operation Rescue, 726 F. Supp. 1483, 1487 (E.D. Va. 1989) [hereinafter *NOW*].

[33] *Abortion Clinic Cleanup Costs in the Thousands*, UPI, Oct. 5, 1989, BC cycle, *available in* LEXIS, News Library, UPI File. Both the cleaning firm and the clinic's insurance carrier asked that their names not be revealed in order to avoid harassment. *Id.*

[34] Michael C. Tipping, *Abortion Demonstrators Square Off at Clinics*, UPI, Apr. 30, 1989, *available in* LEXIS, News Library, UPI File.

[35] *Id.*

[36] *MacNeil/Lehrer NewsHour* (PBS broadcast, transcript 4183, Oct. 16, 1991) (quoting Mr. Kwame Holman).

groups than state claims under trespass, harassment or interference with business claims. A § 1985(3) injunction can cover large geographic areas[37] and the plaintiff clinics can recoup attorney's fees and obtain damages.[38] For example, a 1990 federal ruling against Operation Rescue threatened double and triple fines for continued violations and contempt of court fines for any person attempting to donate money to Operation Rescue.[39] As a result of these kinds of decisions, the national headquarters of Operation Rescue closed due to a lack of funds in 1990.[40] Anti-abortionist James Henderson, attorney for Operation Rescue, summarizes, "[o]ur backs are against the wall. The judges are trying to crush us and silence us. This is a declaration of war against pro-life groups."[41] Thus, continued use of § 1985(3) allows abortion clinics to adversely impact Operation Rescue and other groups.

Bray v. Alexandria Women's Health Clinic involved clinics that perform abortions and organizations that support legalized abortion.[42] A variety of organizations, headed by the National Organization for Women, brought suit in the district court on behalf of their memberships, which include women who may wish to use the services of these clinics.[43] The groups sought a permanent injunction against Operation Rescue to prevent "trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility in the Washington Metropolitan area that offers and provides legal abortion services."[44] The injunction was sought in response to a series of protests staged in the Washington area during two

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[37] Linda Greenhouse, *Supreme Court Says Klan Law Can't Bar Abortion Blockades*, N.Y. TIMES, Jan. 14, 1993, at 1.

[38] 42 U.S.C. § 1985(3) (1988).

[39] John Purnell, *Operation Rescue Left Broke by Court Battles*, WASH. TIMES, Oct. 10, 1990, at A1.

[40] *See* Ciolli, *supra* note 31. Operation Rescue went from a paid staff of 23 and a budget of $850,000 to three volunteer staff members. Purnell, *supra* note 39.

[41] Purnell, *supra* note 39.

[42] *Bray*, 113 S. Ct. at 753, 758.

[43] *NOW*, 726 F. Supp. at 1487.

[44] *Id.* at 1486. The areas to be included in this injunction were the District of Columbia, Prince George's County and Montgomery County in Maryland, and Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County and the City of Alexandria in Virginia. *Id.* at 1487.

weekends in November 1989 which resulted in the temporary closing of clinics in Washington D.C. and Maryland.[45]

At the district court level, the plaintiffs asserted two causes of action under § 1985(3) and three state claims of trespass, public nuisance, and tortious interference with business.[46] The trial court identified four requirements for a § 1985(3) action:

> (i) a conspiracy; (ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (iii) an act in furtherance of the conspiracy; (iv) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.[47]

The court found that members of Operation Rescue had met "to plan, organize, coordinate and carry out 'rescue' operations that involved unlawful means"[48] and that such rescues prevented women from obtaining abortion-related services at the clinics involved.[49] The trial court concluded that a gender-based animus satisfies the purpose element of *Griffin* and therefore the plaintiffs satisfied the purpose and animus requirements of *Griffin*.[50] The court further reasoned that

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[45] *Id.* at 1490.

> Clinics . . . were closed as a result of "rescues" on November 10, 11, and 12, 1989. The following weekend, on November 18, 1989, the Hillcrest Women's Surgi-Center in the District of Columbia was closed for eleven (11) hours as a result of a "rescue" demonstration. Five (5) women who had earlier commenced the abortion process at the clinic by having laminaria inserted were prevented by "rescuers" from entering the clinic to undergo timely laminaria removal.

Id.

[46] *NOW*, 726 F. Supp. at 1492-93 (characterizing a § 1985(3) claim as a "Conspiracy to interfere with Plaintiffs' Right to Interstate Travel Pursuant to 42 U.S.C. § 1985(3)" and a "Conspiracy to Interfere with Plaintiffs' Privacy Rights Pursuant to 42 U.S.C. § 1985(3).").

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1492-93.

[50] *NOW*, 726 F. Supp. at 1493.

since many women travel from out of state to utilize the services provided at the clinics, the defendants' actions infringed upon the plaintiffs' constitutional right to interstate travel.[51]

The plaintiffs also argued that the rescues impacted the patients' ability to obtain an abortion, a right so fundamental that it is protected against all interference.[52] However, the trial court concluded that, in light of *Webster v. Reproductive Health Services*,[53] which put the right to abortion somewhat into question, this claim was problematic, finding it "unnecessary and imprudent to venture into this thicket."[54] Thus, the district court declined to decide whether a § 1985(3) claim could be pursued only on the basis of the right to obtain an abortion.

The trial court issued an injunction preventing the defendants from protest activity at the nine abortion clinics involved.[55] The defendants were required to give notice of the injunction to its members in Northern Virginia, and to file an affidavit outlining how this notice was given.[56] However, the injunction was effective only until July 31, 1990 at 5:00 p.m. unless the plaintiffs could show good cause for an extension.[57] Finally, the district court directed the defendants to pay the attorneys' fees incurred by the plaintiffs.[58]

The court of appeals affirmed every aspect of the district court's decision, finding that "the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by

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[51] *Id.* at 1489 (stating that approximately 20 to 30% of the patients treated at the Commonwealth Women's Clinic in Falls Church, Virginia come from outside the state).

[52] *Id.* at 1493-94.

[53] 492 U.S 490 (1989) (involving the constitutionality of the preamble of a Missouri statute stating that life begins at conception; the Court held that this was not a regulation of abortion, but rather a statement of the state's preference for life).

[54] *NOW*, 726 F. Supp. at 1493.

[55] *Id.* at 1496-97 (concluding that plaintiff's request for enjoinment of activities which intimidate, harass, or disturb patients would result in a violation of defendants' First Amendment rights to express their views on abortion issues).

[56] *Id.* at 1496-98 (requiring that the notice include a listing of the consequences which could arise from a violation of the injunction including contempt of court, imprisonment, and a $1,500 fine).

[57] *Id.* at 1498.

[58] *Id.*

law."[59] The appellate court specifically noted that a gender-based animus was sufficient to satisfy § 1985(3).[60]

C. *Supreme Court Arguments*

Deborah Ellis, representing the clinics, characterized the defendants' actions as a national conspiracy to prevent women from exercising their right to choose abortion.[61] She pointed to *Planned Parenthood of Southeastern Pennsylvania v. Casey*[62] which noted the indispensable nature of abortion rights to women's economic and social standing.[63] Ms. Ellis disagreed with the distinction drawn by the defense that women seeking abortions are merely a subset of the class of women and not protected, noting that discrimination usually attaches to a subset of a class.[64] Ms. Ellis continued that the interference with interstate travel present here "couldn't be more blatant" as it involved actual physical prevention of movement.[65]

Jay Alan Sekulow, representing Jayne Bray,[66] argued that the members of Operation Rescue "did not engage in their conduct because of its effect on women, but because of their opposition to abortion."[67] He contended that applying § 1985(3) in this instance would turn the statute into a general federal tort law, especially since relief is available under state trespass and nuisance laws.[68] Sekulow continued that women seeking abortions do not constitute a protected class as required by § 1985(3), noting that a class should be defined by who people are rather than by what activity they pursue, and that pregnancy-classifications in general have not been found to constitute

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[59] National Organization for Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990).

[60] *Id.* (noting the similar holdings of at least six other circuits).

[61] *See* Marcia Coyle, *Abortion Protests*, THE NAT'L L. J., Oct. 19, 1992, at 30.

[62] 112 S. Ct. 2791 (1992); *see supra* note 2.

[63] *Arguments*, *supra* note 3.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Coyle, *supra* note 61, at 30.

[68] *Arguments*, *supra* note 3, at 3296.

invidious sex-discrimination.[69] Finally, Sekulow stated that there was no intentional interference with the interstate right to travel, especially since the activists had not distinguished in-state from out-of-state travellers in their rescue efforts.[70]

John G. Roberts Jr., Deputy Solicitor General, appeared on behalf of the United States as amicus curiae for the Operation Rescue defendants. Mr. Roberts stated that the United States appeared in this case not to defend Operation Rescue's tortious conduct but rather to defend the proper interpretation of § 1985(3).[71] He argued that rescues do not interfere with plaintiffs' rights as women, but rather with their actions as women.[72]

II. The Supreme Court Decision

A. Holding

On January 13, 1993, the Supreme Court rendered its decision in *Bray v. Alexandria Women's Health Clinic*, holding that § 1985(3) cannot be used against anti-abortion protestors.[73] The majority opinion was written by Justice Scalia, joined by Justices Rehnquist, White, Kennedy and Thomas.[74] Justice Kennedy wrote a short concurring opinion,[75] while Justice Souter concurred in the judgement but dissented in part.[76] Justices Stevens and O'Connor both wrote dissenting opinions, both of which were joined by Justice Blackmun.[77]

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[69] *Id.*

[70] *Id.*

[71] Linda Greenhouse, *Abortion-Protest Case Resumes in High Court*, N.Y. TIMES, Oct. 7, 1992, at A14.

[72] *Arguments*, *supra* note 3.

[73] 113 S. Ct. 753, 758 (1993).

[74] *Id.* at 757.

[75] *Id.* at 768 (Kennedy, J., concurring).

[76] *Id.* (Souter, J., concurring in part, dissenting in part).

[77] *Id.* at 779 (Stevens, J., dissenting); *id.* at 799 (O'Connor, J., dissenting).

B. The Majority Opinion By Justice Scalia

The majority found that the scope of § 1985(3) does not encompass claims against abortion protestors.[78] Justice Scalia based this position on three points: (i) respondents have not satisfied the animus requirement of *Griffin*; (ii) respondents have not established that petitioners interfered with a right protected against interference by § 1985(3); and (iii) the so-called "hindrance clause" of § 1985(3) was not violated.[79]

1. The Animus Requirement

According to the majority, the requirements for a § 1985(3) action are: (i) a racial or class-based invidiously discriminatory intent as defined in *Griffin* and (ii) a showing that the conspiracy was designed to interfere with rights protected against governmental and private encroachment as defined in *Carpenters*.[80] To interpret *Griffin* to mean that § 1985(3) reaches private conspiracies transforms the statute into a general federal tort law.[81] Scalia wrote that the only way to avoid this result was to require an invidiously discriminatory motivation of a racial or "perhaps" class-based nature as defined in *Griffin*, but finds nothing to support extension of such class-based motivation to the facts presented in this case.[82] Scalia rejected the notion that the term "class" includes women seeking abortions, since the term "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct."[83] In response to the assertion that the discrimination is directed at the class of women as a whole, Scalia said that such an interpretation would require a "purpose that focuses upon women by reason of their sex."[84] Instead, as the district court found, the record indicated that

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[78] *Bray*, 113 S. Ct. at 758.

[79] *Id.* at 758-68.

[80] *Id.* at 758-59.

[81] *Id.*

[82] *Id.* at 759.

[83] *Bray*, 113 S. Ct. at 759.

[84] *Id.* at 759-60.

petitioners' demonstrations were "physical intervention between abortionists and innocent victims" rather than against women per se.[85]

For the intent of the demonstrators to rise to the level of a § 1985(3) claim, it must be shown "(1) that opposition to abortion can reasonably be presumed to reflect a sex based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect."[86] As to the first point, Scalia reasoned that the demonstrators did not possess a sex-based intent since common and respectable reasons for opposing abortion exist, with both men and women on both sides of the issue.[87] Further, the Court held that since it is essential to require intent in this type of § 1985(3) claim, to do otherwise is to say that "since voluntary abortion is an activity engaged in only by women, to disfavor it is ipso facto to discriminate invidiously against women as a class."[88] Relying on equal protection sex-discrimination cases such as *Geduldig v. Aiello*[89] and *Personnel Administrator v. Feeney*,[90] the decisions of the Court do not indicate that such action is discrimination against women.[91] Following its decisions in *Maher v. Roe*[92] and *Harris v. McRae*,[93] the Court held that these types of cases do not require the heightened scrutiny standard used for sex-based discrimination, but only the ordinary rationality standard.

In concluding, the opinion characterized the animus intended by § 1985(3) as follows:

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[85] *Id.* (citing *Bray*, 726 F. Supp. at 1488).

[86] *Id.* at 760.

[87] *Id.*

[88] *Bray*, 113 S. Ct. at 760.

[89] 417 U.S. 484 (1974) (holding that the exclusion of pregnancy-related disabilities from a state disability insurance program did not violate the Equal Protection Clause). The Court found that the ability to divide the recipients into two groups, pregnant and non-pregnant individuals, was not a discriminatory classification. *Id.* at 496-97.

[90] 442 U.S. 256, 279 (1979) "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.*

[91] *Bray*, 113 S. Ct. at 760.

[92] 432 U.S. 464 (1977).

[93] 448 U.S. 297 (1980).

> Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself does not remotely qualify for such harsh description and for such derogatory association with racism. To the contrary, we have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds . . . . This is not the stuff out of which a § 1985(3) "invidiously discriminatory animus is created."[94]

2. *Interference With a Protected Right*

The Court interpreted *Carpenters* as requiring an intent to deprive persons of a right which is protected from private interference. Respondents contended that the right to interstate travel was impeded in this case, a right which is "in at least some contexts, a right constitutionally protected against private interference."[95] However, it is not enough that a right be incidentally affected; the right must be the target of the action, not merely a by-product of it.[96] From the record, only local travel was impeded by the demonstrations and that is not an infringement on interstate travel.[97]

Respondents contended that petitioners intentionally impaired their right to an abortion. The Court conceded that this was the focus of the petitioners' actions, but continued that "deprivation of that federal right (whatever its contours) cannot be the object of a purely private conspiracy."[98] Citing the finding in *Carpenters* that a private conspiracy aimed at First Amendment rights does not violate §

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[94] *Bray*, 113 S. Ct. at 762 (citing *Maher*, 432 U.S. at 474).

[95] *Id.* at 762 (citing Griffin, 403 U.S. at 105-106).

[96] *Id.* at 762-63 "Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel." *Id.*

[97] *Id.* at 763 "The federal guarantee of interstate travel does not transform state-law torts into federal offenses when they are intentionally committed against interstate travellers. Rather, it protects interstate travelers against two sets of burdens: "the erection of actual burdens to interstate movement" and "being treated differently" from intrastate travelers." *Id.*

[98] *Id.* at 763.

1985(3),[99] the Court held that the statute does not apply to actions targeting a right which is, by definition, only a right against state interference.[100] Section 1985(3) addresses only the interference with rights which are specifically protected against private interference, a category from which the Court excludes abortion.[101]

3. Hindrance Clause

The Court addressed whether the petitioners violated the second clause of § 1985(3)—what the majority termed the "hindrance clause."[102] First, he notes that the respondents admit that their complaint did not include a claim under this portion of the statute.[103] Further, since neither the district court nor the court of appeals considered such a claim, it should not be considered by the Supreme Court.[104] In dicta, however, the Court noted that even if the issue were properly before the Court, the respondents would not have stated a valid claim since the hindrance clause requires the same elements of animus as the initial clause of § 1985(3).[105] Even if the requisite animus were present, the hindrance clause argument would also fail since there is no constitutional right protected against the private encroachment at issue.[106]

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[99] *Bray*, 113 S. Ct. at 763.

[100] *Id.* at 764.

[101] *Bray*, 113 S. Ct. at 764. Only the 13th Amendment protection against involuntary servitude and interstate right to travel are protected from official as well as private interference. To include abortion in those rights would give it a preferred place over First Amendment rights to free speech, which were not afforded similar protection in *Carpenters*. *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 764-65.

[105] *Bray*, 113 S. Ct. at 765.

[106] *Bray*, 113 S. Ct. at 765.

4. Attorney's Fees

Since no relief was available under § 1985(3), the Court vacated the prior award of attorney's fees.[107] Although petitioners claimed that the district court lacked subject matter jurisdiction since the § 1985(3) claim was so attenuated and asked that the injunction be vacated and the entire claim be dismissed, the Court did not find the § 1985(3) claims to be so "wholly insubstantial and frivolous" as to deny subject matter jurisdiction.[108] However, the case was remanded for a determination of whether the injunction entered by the district court under state law claims should be sustained in light of this opinion.

5. Conclusion

The majority in *Bray* found that while trespass is unlawful in every state, and may give rise to state-based criminal and civil actions, such actions do not automatically "give rise to a federal cause of action simply because their objective is to prevent the performance of abortion any more than they do so when their objective is to stifle free speech."[109]

C. Justice Kennedy's Concurrence

In his concurring opinion, Justice Kennedy stated that the "[dissenting Justices'] inability to agree on a single rationale (for a § 1985(3) claim) confirms, in my view, the correctness of the Court's opinion."[110] Nonetheless, Kennedy proposed an alternative statute for recourse for the clinics—42 U.S.C. § 10501.[111] Kennedy believes

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[107] *Id.* at 767-68.

[108] *Id.* at 768.

[109] *Id.*

[110] *Id.* (Kennedy, J., concurring).

[111] *Id.* at 769. When "state and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law," this statute empowers the Attorney General to put federal law enforcement resources at the disposal of state

this statute is the more appropriate medium for protecting the federal rights of the respondents and others in a similar situation.[112]

D. Justice Souter's Concurrence In Part and Dissent in Part

Justice Souter adhered to the definition of class-based animus requirement formulated in *Griffin* and *Carpenters*, and its applicability to private actions.[113] "I know of no reason that would exempt us from the counsel of *stare decisis* in adhering to this settled statutory construction, which Congress is free to change if it should think our prior reading unsound."[114]

However, Souter believed that the hindrance clause, which he called the prevention clause, was properly before the Court.[115] In fact, he noted that respondents should have been permitted to include a supplemental brief addressing this issue, a request which was denied by the Court.[116] He addressed whether the additional conditions defined in *Griffin* and *Carpenter* should be included in an analysis under the second clause,[117] noting that the clause should be read independently, focusing on its plain meaning.[118] Justice Souter conceded that the conditions imposed on § 1985(3) by *Griffin* and *Carpenter* probably took the statute away from the areas Congress intended it to address, concluding that to impose these requirements on the prevention clause would work the same result.[119] He reasons that the prevention clause does not carry the possibility of becoming a general federal tort law and therefore does not require any limiting

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government. 42 U.S.C. § 10501 (1988).

[112] *Bray*, 113 S. Ct. at 769.

[113] *Id.* at 769-70 (Souter, J., concurring in part and dissenting in part).

[114] *Id.* at 770.

[115] *Id.* at 770.

[116] *Id.* at 770-71.

[117] *Bray*, 113 S. Ct. at 771.

[118] *Id.*

[119] *Id.* at 771 (Souter, J., concurring in part and dissenting in part).

conditions.[120] Further, Souter found the private action requirement in contravention of the prevention clause itself.[121] He would include conspiracies designed to "hinder or prevent law enforcement authorities from giving normal police protection to women attempting to exercise the right to abortion" in the prevention clause's reach.[122] The denial of civic benefits to a group because they seek something guaranteed by the Constitution would be a classification for a forbidden reason, i.e., a violation of equal protection.[123] In closing, Justice Souter recommended that the court of appeals decision be vacated and the case remanded for consideration of this issue.[124]

E. Dissent—Justice Stevens

Justice Stevens relied on his interpretation of the legislative history of § 1985(3) and the plain language of the statute in disagreeing with the majority's interpretation of the animus requirement.[125] The interference with interstate right to travel constitutes deprivation of a constitutional right under § 1985(3), and Stevens found the hindrance clause to be a viable alternative for the clinics.

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[120] *Id.* at 775. "[I]n order to satisfy the requirement of affecting the law enforcement system sufficiently, such a conspiracy would need to envision action capable of countering numbers of officers or injuring their responsive capacity" and this requirement in and of itself prevents this section of the statute from becoming a federal tort law. *Id.* at 775-76.

[121] *Bray*, 113 S. Ct. at 776.

[122] *Id.*

[123] *Id.* at 777. "When private individuals conspire for the purpose of arrogating and, in effect, exercising the State's power in a way that would thus violate equal protection if so exercised by state officials, the conspiracy becomes actionable when implemented by an act 'whereby [a person] is injured in his person or property, or deprived of . . . any right or privilege of a citizen of the United States.'" *Id.* (quoting 42 U.S.C. § 1985(3)).

[124] *Id.* at 779 (Souter, J., concurring in part and dissenting in part).

[125] *Bray*, 113 S. Ct. at 780 (Stevens, J., dissenting).

1. Legislative History and Statutory Interpretation

Justice Stevens asserted that the text and the legislative history of the statute and Supreme Court precedents support the respondents' position,[126] finding that the majority ignored the intent, history and language of § 1985(3) in a misplaced reliance upon prior precedent.[127] Congress' intent and the plain meaning of the statute clearly covers the petitioner's actions,[128] since "[the rescue] presents a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name."[129] Although Congress did not anticipate the use of the statute for women in this type of situation, Stevens does not believe there is "a sufficient reason for refusing to construe the statutory text in accord with its plain meaning, particularly when that construction fulfills the central purpose of the legislation."[130]

Further, a narrow reading of *Griffin* is necessary only where there is a fear that a broad interpretation will result in § 1985(3) becoming a general federal tort law.[131] However, Stevens does not find this case to be such an instance. In *Griffin*, the Court noted "a sufficient reason for rejecting the doctrine of *stare decisis* whenever it would result in an unnecessarily narrow construction of the statute's plain language."[132]

2. Animus Requirement

Justice Stevens characterized the animus component as requiring a demonstration: (1) that opposing abortion can be presumed to be a sex-based intent or (2) that a class-based animus can be shown merely from the effects of the action, not the intent.[133]

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[126] *Id.* at 779.

[127] *Id.* at 783.

[128] *Id.* at 783.

[129] *Id.* at 782.

[130] *Bray*, 113 S. Ct. at 785.

[131] *Id.*

[132] *Id.*

[133] *Id.*

a. Sex-Based Intent

The majority's characterization of the animus requirement as "a malevolent form of hatred or ill-will" is not supported by *Griffin*,[134] since the Court did not require a showing by the plaintiffs that the beatings they received were caused by a hatred for African-Americans.[135] Stevens state that finding a class-based animus in *Bray* "does not require finding that to disfavor abortion is 'ipso facto' to discriminate invidiously against women."[136] Instead, a conspiracy involving force which prevents a woman from asserting her constitutional right to an abortion "may 'reasonably be presumed to reflect a sex based intent.'"[137] Because women are a protected class, and because this conspiracy is directed toward conduct in which only women may engage, these actions are included in the animus requirement.[138] Since only women travel to abortion clinics, the activities of petitioners are clearly directed toward women.[139] Justice Stevens questioned the majority's view that discrimination is presumed only when there is no rational basis for opposition to a behavior or trait.[140] The mere fact that not every woman wants or believes in abortion does not mean that there is no longer any discriminatory intent.[141] The entire purpose of such legislation, Stevens continued, is for the Court to "see through the excuses—the 'rational' motives—that will always disguise discrimination."[142]

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[134] *Id.* at 786 (Stevens, J., dissenting).

[135] *Bray*, 113 S. Ct. at 786.

[136] *Id.* at 787.

[137] *Id.* at 787 (quoting majority opinion at 760).

[138] *Id.* at 787. "It is not necessary that the intended effect upon women be the sole purpose of the conspiracy. It is enough that the conspiracy be motivated 'at least in part' by its adverse effects upon women." *Id.*

[139] *Bray*, 113 S. Ct. at 787 (Stevens, J., dissenting).

[140] *Id.* at 788. This interpretation makes sense "only if every member of a protected class exercises all of her constitutional rights, or if no rational excuse remains for otherwise invidious discrimination." *Id.*

[141] *Id.*

[142] *Id.* at 789.

b. Effect, Not Intent

Justice Stevens found that as a matter of statutory construction, treating the instant case as satisfying the class-based animus requirement would in no way turn § 1985(3) into a federal tort law or cast doubt upon the constitutionality of the statute.[143] Stevens disagreed with the majority's reliance upon the disability benefits and abortion funding cases to deny the required animus in the present case, stating that those cases did not address the same issues involved here—namely, statutory protection of citizens from interference with their constitutional rights.[144] Stevens questioned the majority's reliance on *Geduldig v Aiello*, noting that the holding was not that pregnancy-based classifications never run afoul of equal protection, but that "not every legislative classification based on pregnancy was equivalent, for equal protection purposes, to the explicitly gender-based distinctions struck down" in other Supreme Court cases.[145] He noted that the holding in *Geduldig* depended upon the fact that it was an insurance system which applied to both men and women. Stevens wrote:

> The distinction between those who oppose abortion, and those who physically threaten women and obstruct their access to abortion clinics, is also more than semantic. Petitioners in this case form a mob that seeks to impose a burden on women by forcibly preventing the exercise of a right that only women possess.[146]

Additionally, the abortion-funding cases cited by the majority turn on the difference between monetary benefits being denied and burdens being imposed.[147]

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[143] *Bray*, 113 S. Ct. at 789.

[144] *Id.*

[145] *Id.* at 789.

[146] *Id.* at 789-90.

[147] *Id.* at 789-90.

Any law which burdens pregnant women is sex-based discrimination, since only women can become pregnant.[148] Justice Stevens noted the agreement of Congress with this belief in its adoption of the Pregnancy Discrimination Act[149] which rejected *Geduldig* and stated that discrimination based on pregnancy was prohibited sex discrimination.[150] In further support of this proposition, Stevens cited the Supreme Court decision in *Automobile Workers v. Johnson Controls*[151] which found a policy discriminatory "because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females."[152]

Finally, Stevens asserted that the majority confused the scienter requirement of 18 U.S.C. § 241[153] with the requirements of § 1985(3)—although § 1985(2) did contain criminal sanctions, these were found unconstitutional in 1883.[154] Thus, strict intent requirement is not proper for a § 1985(3) claim.[155]

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[148] *Bray*, 113 S. Ct. at 789-90.

[149] 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e (1988)). This amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination against pregnant women. Stevens noted that in Newport News Shipbuilding & Dry Dock Co. v. EEOC, the Court stated that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." 462 U.S. 669, 684 (1983).

[150] *Bray*, 113 S. Ct. at 790-91.

[151] 499 U.S. 187 (1991) (holding that a fetal protection policy that excluded women capable of having children from certain positions which required exposure to lead, was discriminatory on its face, not merely in its effect).

[152] *Bray*, 113 S. Ct. at 791 (citing Automobile Workers v . Johnson Controls, 499 U.S. 187 (1991)).

[153] *Id.* at 793.

[154] *Id.*

[155] *Id.* at 793-95. In a footnote, Justice Stevens noted that *Griffin* itself rejected the notion that § 1985(3) contained a specific intent requirement. In fact, the Court said that the "motivation requirement of § 1985(3) must not be confused with the test of 'specific intent to deprive a person of a federal right made definite by decision or other rule of law . . . .'" *Id.* at 794 n. 33 (quoting *Griffin*, 403 U.S at 102 n.10).

3. Interference With a Protected Right

The right to interstate travel is inseparable from the respondent's right to seek an abortion.[156] According to Justice Stevens, the majority has misinterpreted the right to interstate travel as protecting only interferences which discriminate against non-residents. He disagreed with the Court's finding that as long as equal burdens are imposed on local travellers, no burden on interstate travel has been imposed.[157] He wrote that "discrimination is a necessary element of the class-based animus requirement, not of the abridgement of a woman's right to engage in interstate travel."[158]

4. Hindrance Clause

Justice Stevens found that the respondents stated a clear case under the so-called hindrance clause.[159] "A conspiracy that seeks to interfere with law enforcement officers' performance of their duties entails sufficient involvement with the State to implicate the federally protected right to choose an abortion and to give rise to a cause of action under § 1985(3)."[160] Whether there is a class-based animus requirement for this clause has not yet been determined, but Stevens postulates that the holding in *Kush v. Rutledge*,[161] which did not impose such a requirement, would apply in this case as well.[162] In addition, the equal protection language added to that section would prevent an overbroad sweep of power.[163]

Finally, Justice Stevens stated that a class-based animus could be inferred if the activities engaged in burdened an activity

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[156] *Bray*, 113 S. Ct. at 782.

[157] *Id.* at 793.

[158] *Id.* at 795.

[159] *Id.* at 798.

[160] *Id.* at 796.

[161] 460 U.S. 719 (1983) (interpreting § 1985(2) and rejecting the idea that the plaintiffs had the burden of proving animus as defined in *Griffin*).

[162] *Bray*, 113 S. Ct. at 796.

[163] *Id.* at 797.

predominantly pursued by members of the class.[164] It would comply with *Griffin* and the hindrance clause to find that the "clause proscribes conspiracies to prevent local law enforcement authorities from protecting activities that are performed exclusively by members of a protected class, even if the conspirators' animus were directed at the activity rather than at the class members."[165] Stevens found that the hindrance claim, on its own, would constitute appropriate grounds for affirmance by the court of appeals.[166]

5. Conclusion

In closing, Justice Stevens wrote:

> Indeed, the error that infects the Court's entire opinion is the unstated and mistaken assumption that this is a case about opposition to abortion. It is not. It is a case about the exercise of Federal power to control an interstate conspiracy to commit illegal acts. I have no doubt that most opponents of abortion, like most members of the citizenry at large, understand why the existence of federal jurisdiction is appropriate in a case of this kind.[167]

This final comment seems to imply that the majority opinion does not reflect a true reading of § 1985(3), but rather is a reflection of their stance on the abortion issue.

F. Justice O'Connor's Dissent

Justice O'Connor's approach to § 1985(3) focuses on the legislative intent of Congress and the plain meaning of the statute.

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[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Bray*, 113 S. Ct. at 798.

In examining the legislative history of § 1985(3), Justice O'Connor noted that, in general, "[t]he Court's approach to Reconstruction Era civil rights statutes has been to 'accord [them] a sweep as broad as [their] language.'"[168] She determined the majority does the exact opposite by "precluding application of the statute to a situation that its language clearly covers."[169] The evidence in the record clearly places the respondents within the purview of the statute.[170]

Justice O'Connor discussed the class-based animus requirement in light of the case law and legislative history of the statute.[171] A narrow construction of *Griffin* is an attempt to ensure that § 1985(3) does not become a broad federal tort statute.[172] However, the legislative history should be controlling in determining the nature of animus. She found the clearest statement of Congressional intent in the words of Senator Edmunds:

> [Congress was not] undertak[ing] in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud . . . [but, if] it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.[173]

O'Connor found the *Griffin* description a valid representation of Congressional intent, and believes the narrowing of *Carpenters* and subsequent cases violate it.[174]

Section 1985(3) applies to conspiracies which target a gender-based class and includes petitioners' actions in that category.[175] At

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[168] *Id.* at 799 (O'Connor, J. dissenting) (quoting United States v. Price, 383 U.S. 787, 801 (1966)) .

[169] *Id.* at 799.

[170] *Id.*

[171] *Id.* at 800.

[172] *Bray*, 113 S. Ct. at 800.

[173] *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. at 567 (1871).

[174] *Id.* at 801.

[175] *Id.*

a minimum, O'Connor noted, the classes under § 1985(3) should include those classifications that the Court has determined merit heightened scrutiny under the Equal Protection Clause.[176] Gender-based classifications, like the one in the present case, are within this range of classifications.[177] O'Connor agreed with Justice White's dissenting opinion in *Great American Federal Savings & Loan v. Novotny*[178] that "it is clear that sex discrimination may be sufficiently invidious to come within the prohibition of Section 1985(3)."[179] Finding that women are a protected class within § 1985(3), Justice O'Connor reasoned that the statute "must reach conspiracies whose motivation is directly related to characteristics of that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women."[180]

Justice O'Connor found no merit in petitioners' assertion that their actions were motivated by their firm belief that abortion is wrong, rather than by a discriminatory animus.[181] While noting that she was not questioning the sincerity of these beliefs, O'Connor commented that there are other avenues of expression open to them which would not infringe upon the interests of the respondents.[182] She questioned the majority's finding that it is irrelevant to a finding of animus that unlawful means were used to achieve the goal.[183] The unlawful treatment of lawful activities is a class-based deprivation within the reach of § 1985(3).[184] As to the majority holding that in light of the Equal Protection Clause the discriminatory animus has not been met, O'Connor proposed that a state action requiring a higher standard was not at issue.[185] The difference between the heightened animus standard under equal protection and the animus standard

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[176] *Id.*

[177] *Bray*, 113 S. Ct. at 801.

[178] 442 U.S. 366, 389 (1979).

[179] *Id.*

[180] *Bray*, 113 S. Ct. at 801-02.

[181] *Id.* at 802.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 801.

[185] *Bray*, 113 S. Ct. at 803.

under a private-action based § 1985(3) claim is critical.[186] "*Griffin*'s element of class-based discrimination is met whenever private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law."[187] Further, as to the Court's definition of "invidious" used to sustain this interpretation, O'Connor noted that such reasoning might be correct if that term were in the words of the statute, but it is not.[188] An examination of the language in *Griffin* should not be used as a substitute for Congressional intent.[189]

Justice O'Connor stated that reliance upon *Geduldig* is also misplaced because that case involved a state action, not a claim involving private parties.[190] She noted that Congress has again made clear its "position that showing subjective intent to discriminate is not always necessary to prove statutory discrimination"[191] in its recent Civil Rights Act of 1991.[192] Justice O'Connor was also willing to base her entire reasoning on the hindrance clause of § 1985(3).[193] She agreed with Justice Stevens that the respondents could sustain their claim under this second clause of § 1985(3).[194]

In conclusion, Justice O'Connor noted that the Court breathed new life into § 1985(3) by overturning of *Collins v. Hardyman*[195] in *Griffin*, thereby providing a return to Congressional intent.[196] "Today the Court takes yet another step in restricting the scope of the statute, to the point where it now cannot be applied to a modern-day paradigm of the situation the statute was meant to address."[197]

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[186] *Id.* at 804.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Bray*, 113 S. Ct. at 803.

[191] *Id.*

[192] 42 U.S.C. § 1981(a) (Supp. III 1991).

[193] *Bray*, 113 S. Ct. 804-05.

[194] *Id.*

[195] 341 U.S. 651 (1951); *see supra* note 19.

[196] *Bray*, 113 S. Ct. at 805.

[197] *Id.*

III. Anticipated Aftermath and Concluding Remarks

With the *Bray* decision, the fate of at least twenty federal court injunctions presently preventing protests at various abortion clinics hangs in the balance.[198] Pro-choice groups anticipate an increase both in the number of protests at abortion clinics and in the number of individuals participating in such activities.[199] Kathryn Kolbert, an attorney from the Center for Reproductive Law and Policy notes:

> This decision is like giving license to violence, almost like chumming for sharks. If you dump the blood, they come around. And this decision will encourage a lot of marginal people to step up their attacks on abortion clinics. We've had forty-three chemical attacks on abortion clinics in the last nine months, and it's going to get worse. [200]

On Wednesday, March 11, 1993, as Dr. David Gunn walked toward the back door of the Pensacola Women's Medical Services clinic in Florida where he performed abortions, he was shot in the back by Michael F. Griffin.[201] On August 20, 1993, Oregon housewife Rachelle Shannon was arrested in the shooting of Dr. George Tiller of Wichita Kansas;[202] Dr. Tiller survived the attack and reported to work the next day.[203] Ms. Shannon was an ardent anti-abortionist, who believed Michael Griffin to be "the awesomest, greatest hero of our time."[204]

Anti-abortion groups see the decision as "neutraliz[ing] a powerful weapon against them."[205] Keith Tucci, Executive Director

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[198] Tamar Lewin, *Abortion-Rights Groups See A Rise in Attacks on Clinics*, N.Y. TIMES, Jan. 14, 1993, at D25.

[199] *Id.*

[200] *Id.*

[201] *The Death of Dr. Gunn*, N.Y. TIMES, Mar. 12, 1993, at A1.

[202] Tony Rogers, *Slay Suspect's Fan*, DAILY NEWS, Aug. 23, 1993, at 18-19.

[203] Zachary Margulis, *The Violent Struggle*, DAILY NEWS, Aug. 23, 1993, at 18.

[204] Rogers, *supra* note 202.

[205] *Id.*

of Operation Rescue, said that a lawsuit under § 1985(3) "was a great intimidation tactic for people who said, 'Look, that's what can happen if you get involved with Operation Rescue.' What this decision tells people is that it is perfectly legal to protest the killing of unborn babies."[206]

A. Legislative Response

On February 3, 1993, a bill was introduced to the House of Representatives by Representative Charles E. Schumer, a Democrat from Brooklyn.[207] The Senate version was introduced in the Senate by Senator Edward Kennedy on March 23, 1993.[208] The Senate version of the bill has been adopted, but in early April 1994, disagreement between the houses on amendments to the bill resulted in the scheduling of additional conferences between the House and the Senate.[209]

The current version of the bill, the Freedom of Access to Clinic Entrances Act of 1993, would be an amendment to the Public Service Health Act and would ensure freedom of access to medical clinics and related facilities.[210] The penalties for its violation would include jail sentences and civil remedies.[211]

Part of the Congressional Statement of Findings and Purpose explicitly discusses the decision of the *NOW* case as an impetus for this legislation.

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[206] Lewin, *supra* note 198.

[207] S. 636, 103rd Cong., 1st Sess. § 2715 (1993). Freedom of Access to Clinic Entrances.

[208] *Id.*

[209] S. 636, 103rd Cong., 2nd Sess. §2715 (1994). Freedom of Access to Clinic Entrances.

[210] "Whoever, by force, threat of force, or physical obstruction, intentionally injures, intimidates or interferes with any person, or attempts to do so, because that person or any other person or class of persons is obtaining or providing reproductive health services; or intentionally damages or destroys the property of a facility or attempts to do so, because that facility provides reproductive health services; shall be punished." *Id.*

[211] *Id.*

> In the *Bray* decision, the Court denied a remedy under [Section 1985(3)] to persons injured by the obstruction of access to abortion services; legislation is necessary to prohibit the obstruction of access by women to abortion services and to ensure that persons injured by such conduct, as well as the Attorney General, can seek redress in the federal courts.[212]

By April 1994, the bill had thirty-one co-sponsors in the Senate (twenty-seven Democrats and four Republicans),[213] and 128 co-sponsors in the House (133 Democrats and 15 Republicans).[214]

Anti-abortion groups believe that such a law would interfere with their demonstrations against abortion, claiming further that individuals like Mr. Griffin do not represent their members as a whole.[215] Olivia Gans, a member of the National Right to Life Committee, says:

> The clinic access bill is a sham. The murderer could have walked up to Dr. Gunn any place, any time, and the bill would not have prevented the murder. Any effort on the part of Congress to gag pro-lifers will be unacceptable. The bill is not a middle ground.[216]

However, despite the expected opposition from anti-abortion groups, the Administration seems to be behind the bill. In a recent interview, Attorney General Janet Reno expressed the support of her office. She said:

> I have asked our staff to work with congressional staff to do everything possible to develop legislation that addresses these issues in the most effective manner possible. Passage of this legislation is a priority, it is

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[212] *Id.*

[213] S. 636, 103rd Cong., 2nd Sess. (1994).

[214] *Id.*

[215] Adrianne Appel, *Congress, Administration Move to Keep Abortion Clinics Open*, CHRISTIAN SCI. MONITOR, Mar. 25, 1993, at 2.

[216] *Id.*

> important and we're going to work with Congress to secure passage of it.[217]

This is a drastic change from the implicit encouragement of harassment of abortion facilities of prior administrations.[218]

In addition, many cities have passed laws addressing the issue of anti-abortion protests.[219] For example, two Cleveland suburbs ban picketing directed at specific homes, and both Philadelphia, Pennsylvania and San Jose, California have passed laws making it illegal to inhibit patients' access to abortion clinics.[220]

B. Judicial Response

1. The Hindrance Clause

Another possibility is a case under the hindrance clause of § 1985(3). With Justices Stevens, O'Connor, Blackmun, and Souter expressing their views that such a claim could be sustained on the facts of *Bray*, it is possible that such a cause of action could prove successful. Justice Kennedy could be persuaded to join such an opinion since he seems to be attempting to find a forum to allow respondents relief.[221]

2. The Members of the Supreme Court

The entire makeup of the Court seems to be changing. On March 20, 1993, Justice Byron White announced his retirement.[222] During the selection process President Clinton stated that he would "not ask any potential Supreme Court nominee how he or she will

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[217] *Id.*

[218] *The Death of Dr. Gunn*, N.Y. TIMES, Mar. 12, 1993, at A28.

[219] Max Boot, *Race is on for Injunctions, as Operation Rescue Starts Offensive Against Clinics*, CHRISTIAN SCI. MONITOR, July 9, 1993, at 1.

[220] *Id.*

[221] *See supra* part II.C.

[222] Linda Greenhouse, *White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar. 20, 1993, at A1.

vote in any particular case."[223] However, he did say that he "will endeavor to appoint someone who has an attachment to and belief in a strong and broad constitutional right to privacy."[224] Ultimately, President Clinton selected and the Senate approved Ruth Bader Ginsburg.[225] During the nomination hearings, Ginsburg stated that the right to choose to have an abortion is an essential part of equality for women.[226] In general, she believed that "Congress makes the policy. It writes the laws. People elect members of Congress to make laws for them, and if people don't like those laws, they can vote out the people who make them."[227] However, she continued, "when political avenues become dead-end streets, judicial intervention in the politics of the people may be essential in order to have effective politics."[228] Thus, it is highly likely that Justice Ginsburg could take a stand with the dissenters in *Bray*.

In April 1994, Justice Harry A. Blackmun announced his plans to retire.[229] Thus, President Clinton will again have the opportunity to fill a Supreme Court vacancy and influence its make-up.[230] Further, it is possible that Justice Harry Blackmun and Justice John Paul Stevens may retire within the next few years.[231]

*C. The First post-*Bray *Decision*

The Second Circuit wrote the first post-*Bray* decision - *Town of West Hartford Summit Women's Center West v. Operation Rescue.*[232] The holding interpreted *Bray* narrowly, and remanded the

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[223] *No Litmus Test for High Court: Clinton*, CHI. TRIBUNE, Mar. 23, 1993, at 1.

[224] *Id.*

[225] Martin Kasindorf & Timothy M. Phelps, *In Supreme Company; Ginsburg's Nomination to Top Court is Confirmed*, NEWSDAY, Aug. 4, 1993, at 23.

[226] Lawrence M. O'Rourke, *Ginsburg Speaks Out for Right to Chose*, SACRAMENTO BEE, July 22, 1993, at A1.

[227] *Id.*

[228] *Id.*

[229] *Statements on Retirement of Blackmun from Court*, N.Y. TIMES, Apr. 7, 1994, at A24.

[230] *Id.*

[231] Greenhouse, *supra* note 222.

[232] 991 F.2d 1039 (2nd Cir. 1993).

case for further inquiries.[233] The case began with a series of massive abortion demonstration in 1989 at the Summit Women's Center West in West Hartford.[234] The district court granted a permanent injunction against Operation Rescue in a summary judgement ruling on the Center's § 1985(3) claim, from which Operation Rescue appealed.[235] The appellate court analyzed the court's holding in *Bray* in detail,[236] noting the appellants reliance on *Bray*.[237] However, the appellate court responded: "To the extent that appellants are contending that Bray forecloses all resort to 1985(3) in all instances involving 'persons obstructing access to abortion clinics,' we think appellants have over-read what the Court announced."[238] While the appellate court agreed that *Bray* meant that women seeking abortions are not a class protected by § 1985(3), and that animus directed against women as a whole is not demonstrated, they felt that the "Court's analysis of the animus aspect of *Bray* is tied to the facts there adduced."[239] The appellate court remanded the case for a closer examination of the animus aspect and whether a protected right was inhibited by the district court in light of *Bray*.[240] Abortion supporters praised the ruling, with Ruth Jones, an attorney for NOW, commenting: "It's very exciting the Second Circuit appears to be taking a narrow view of *Bray*."[241] However, others feel that the animus avenue was clearly decided in *Bray*.[242] One of the attorneys representing Operation Rescue noted that "Justice Scalia couldn't have been clearer in finding that opposition to abortion in the form of clinic blockades, does not constitute an animus toward women."[243]

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[233] *Id.*

[234] *Id.* at 1040.

[235] *Id.* at 1040-44.

[236] *Id.* at 1045-47.

[237] *Id.* at 1047.

[238] *Town of West Hartford*, 991 F.2d at 1048.

[239] *Id.*

[240] *Id.*

[241] Deborah Pines, *Leeway Seen in Ruling on Abortion Protests*, N.Y. L.J., Apr. 22, 1993, at 1.

[242] *Id.*

[243] *Id.* (quoting Vincent P. McCarthy).

On October 4, 1993, the Supreme Court denied a writ of certiorari from the Court of Appeals for the Second Circuit,[244] and the case is remanded to Judge Peter C. Dorsey of the District Court of Connecticut.[245] He will now decide if the facts of this case differ sufficiently from those of *Bray* to justify maintaining the injunctions.[246] Jon Schoenhorn, the Hartford attorney representing Summit, believes that although the *Bray* decision indicates that mass abortion protests and clinic invasion are not discriminatory against women, claims which show a conspiracy to interfere with law enforcement in the context of a protest can be sustained.[247]

IV. Conclusion

Pro-choice groups have been hard hit by the removal of the highly effective § 1985(3)claim against anti-abortion protestors. Without the backing of federal force and the economic impact on abortion-protest groups provided under § 1985(3), it will prove difficult, if not impossible, for abortion clinics to remain open and for local authorities to maintain the status quo. Thus, while the Supreme Court keeps chipping away at the right to abortion itself, the decision in *Bray* may make an outright overturning of *Roe v. Wade* unnecessary. If women cannot get into the clinics to exercise their right to abortion, then the right will cease to exist. Thus, the fate of women seeking abortion in this country hangs in the balance.

Suzanne Pence Ferguson

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[244] Syversen v. Summit Women's Ctr. West, Inc., 114 S. Ct. 185 (1993).

[245] Ellen Simon, *Supreme Court Declines Local Operation Rescue Case*, CONN. L. TRIB., Oct. 11, 1993, at 6.

[246] *Id.*

[247] *Id.*